Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

THOMAS M. EELLS,
Petitioner

v.

DIRNFELD & ZELNER, A PARTNERSHIP, et al
Respondents

On Petition for Writ Of Certiorari
To The State of California
Los Angeles County Superior Court
(Case Number BC160535)

PETITION FOR WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED FOR REVIEW

Has your petitioner been denied the civil right of equal protection of the laws, as guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States by the lawyer judges of the State of California, Los Angeles County Superior Court and the lawyer justices of the California Second Appellate District Court of Appeal and the California Supreme Court, in order to and for the sole and exclusive purpose to protect at risk fellow lawyer defendants in a civil action by an *in pro se* non-lawyer layman litigant?

Three ancillary questions presented for review are:

First, was your petitioner denied equal protection of the laws by the lawyer members of the California courts, in order to and for the sole and exclusive purpose to protect at risk fellow lawyer defendants in a civil action by an *in pro se* non-lawyer laymen litigant, irrespective of the possible uncertainty in California laws concerning when a plaintiff can voluntarily dismiss without prejudice a defendant?

Second, was your petitioner denied equal protection of the laws by the lawyer members of the California Courts, in order to and for the sole and exclusive purpose to protect at risk fellow lawyer defendants from an *in pro se* non-lawyer layman litigant, when an entry of default of a law firm partnership in a civil action was vacated on the only basis of a discharge in bankruptcy of an individual partner (and his spouse) as the concluding order of the bankruptcy court, nine months previous to the entry of the partnership's default?

Third, was there a conspiracy among the lawyer members of the California courts, in order to and for the sole and exclusive purpose to protect at risk fellow lawyer defendants from an *in pro se* non-lawyer layman litigant in a civil action to deny your petitioner equal protection of the laws and due process?

LIST OF PARTIES TO THE PROCEEDING

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In The

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

The State of California, Los Angeles County Superior Court (File No. BC160535) filed judgement November 4, 1998, appearing herein as Appendix A, which was appealed to the California Second District Court of Appeal (File No. B127237), which is the highest state court to review the merits in an unpublished opinion, appearing as Appendix B. A Petition for Rehearing was denied and a Petition for Review to the California Supreme Court (File No. S078420) was denied June 16, 1999, appearing as Appendix C. By Remittitur, issued June 24, 1999, appearing as Appendix D, by the appellate court, the entire record is now held by the Clerk of the State of California, County of Los Angeles Superior Court, 111 North Hill Street, Los Angeles, CA 90012. The appendices attached are true copies of the originals thereof.

Jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provision involved in this matter is Section 1 of the 14th Amendment to the Constitution of the United States, guaranteeing that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner asserts that the original trial judge for the State of California, Los Angeles County Superior Court, ruled properly in this matter. However, later, at the importuning of the lawyer defendants, that judge changed her rulings to prejudicially favor the lawyer defendants and deny petitioner equal protection of the laws and due process. Those subsequent decisions were totally devoid of evidentiary support by any rational trier of fact or law. When this injustice was questioned, that judge voluntarily recused herself. The re-assigned trial judge, then acquiesced to the corruption of the original trial judge. On appeal to the California Second District Court of Appeal, those justices then fabricated false determination of facts and made

clearly incorrect errors of law, contravening the past *stare decisis* precedent of the second appellate district and the California Supreme Court and did so without the courage to publish their opinion, in order to support the corruption by the trial court and to avoid critical citatory exposure. The California Supreme Court denied review apparently to avoid embarrassment to the lower courts.

There are three substantial issues in question: first, the determination concerning dismissals in California law; second, vacating a properly entered default of a law firm partnership on the only basis of the discharge in bankruptcy of one individual partner nine months prior to the entry of default; and third, whether the lawyer judges and justices of the California courts have conspired to deny petitioner equal protection of the laws and due process.

The determination of the questions of fact by the California trial court and its court of appeal is so intermingled and mixed with their determination of questions of law, that the determination of questions of fact, in substance and effect has become a decision of the questions of law. The resolution of federal questions of law necessarily requires the review of the facts in this case.

The Second Appellate District Court of Appeal is the highest California court to review the

merits. (Appendix B) The California Supreme Court's denial of review (Appendix C), by California Rules of Court, Rule 24(a), caused the affirmation by the appellate court of the trial court's judgement to become final as of June 16, 1999.

Citations to the record herein are to that record held by the Los Angeles County Superior Court Clerk: Joint Appendix in Lieu of Clerk's Transcript (JA); petitioner's Appellant's Opening Brief; the Appellate Opinion; petitioner's Appellant's Petition for Rehearing to the appellate court; and petitioner's Appellant's Petition for Review to the California Supreme Court; and each followed by a page number. The constitutional question cited *supra* was raised in the trial court (JA 199 and 249); petitioner's Appellant's Reply Brief, page 9; petitioner's Appellant's Petition for Rehearing, page 6; and petitioner's Appellant's Petition for Review, pages 2, 3 and 17.

The California courts deliberately and purposefully evaded consideration of petitioner's federal civil right of equal protection of the laws and due process.

II. THE DISMISSAL.

A. The question of fact of the dismissal.

Petitioner filed a civil action against a law firm partnership and its individual partners *inter alia* for malicious prosecution. The individual partners were properly served and answered the complaint. Later the individuals filed a motion for summary judgement. On the motion's hearing date, August 11, 1997, the court's Minute Order stated in part: "Through inadvertence and error the Court's tentative ruling on the matter for hearing this date is misplaced. The matters are ordered continued to: August 14, 1997." (JA 40)

On August 12, 1997, petitioner served a Request for Dismissal on the individual defendants' counsel. The default was entered by the clerk of the court August 13, 1997. (JA 41)

At the hearing August 14, 1997, the court's Minute Order states in part: "Request for dismissal is filed and entered on August 13, 1997, without prejudice with respect to defendants Barry Zelner and Charles L. Fonarow, only. Each defendant and the plaintiff requests that the court place his motion off calendar: so ordered." (JA 43) In the same order, the trial court ordered petitioner to show cause on

September 19, 1997 why other defendants were not dealt with.

On September 19, 1997, it was shown that, except for the defaulted defendants, all other defendants had been dismissed. In the trial court's Minute Order that date a "DEFAULT PROVE-UP TRIAL" was set for October 29, 1997 on the default and there was "NO notice required" to the dismissed individual lawyer defendants. (JA 54A) At this point, the trial court judge's intentions were clear and her decisions proper. And, the trial court then lost jurisdiction to consider any further pleadings by the dismissed and defaulted defendants.

However, subsequently, on motion by the individual lawyer defendants, the trial judge vacated the dismissal, ordered the motion for summary judgement back on calendar and granted the motion, all of which petitioner asserts was corruptively prejudicial and it improperly denied petitioner equal protection of the laws and due process.

When petitioner alleged prejudice by the trial judge, she voluntarily recused herself. (JA 187) The re-assigned trial judge failed to rectify these prejudicial decisions. (JA 251) The new trial judge acquiesced to the decisions of the recused judge and at the behest of the individual lawyer defendants, filed a judgement replete with false statements, as

shown by the court's own records. (JA 606 and petitioner's Appellant's Reply Brief, page 9.)

B. The question of law of the dismissal.

There may be some uncertainty in California law concerning when a plaintiff can voluntarily dismiss a defendant. This uncertainty was used by the trial court judges and appellate justices to cloak their prejudice.

The California Code of Civil Procedure, section 581(c) states in part:

> "A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety or as to any defendant or defendants, with or without prejudice prior to the actual commencement of trial."

This code section would appear to apply to all trials, but raises the question as to when a trial actually commences. The question is only partially answered by subdivision (a)(6) of the same code section, which defines:

> "'Trial' A trial shall be deemed to actually commence at the beginning of the opening

> statement or argument of any party or his or her counsel, or if there is no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence."

Although these above cited code sections appear unambiguous, the California courts have interpreted these sections as not applying in some respects to trials of law.

The only California case found directly relating to dismissals before a hearing on a motion for summary judgement is Cal-Vada Aircraft Inc. v. Superior Court (1986) 179 Cal.App.3d 435. That court referred to a California Supreme Court case, Wells v. Marina City Properties (1981) 29 Cal.3d 781, although the Wells case concerned demurrer. The Cal-Vada court stated in part at its page 443:

> "Wells, does not adequately define for us whether trial has commenced in summary adjudication proceedings. We note, however, the Supreme Court stated in dicta that the 'right of voluntary dismissal ... would ... not be impaired *prior* to a decision sustaining the demurrer' ... The statement lends support to

> the notion our Supreme Court continues to hold that it is the hearing *and determination* of a question of law for the purposes of the voluntary dismissal statute." (Emphasis in original text.)

The Wells case concerned demurrer where a demurrer was sustained but with leave to amend and the plaintiff failed to amend within the time allowed. The full California Supreme Court Wells quotation at its pages 789-790 is:

> "... we note that such right of voluntary dismissal, which is not barred until expiration of plaintiff's time to amend after the sustaining of the demurrer, would also not be impaired *prior* to a decision sustaining the demurrer." (Emphasis in original text.)

This California Supreme Court dicta was followed by the *stare decisis* precedent of the California Second Appellate District's decision in Datner v. Mann Theatres Corp. (1983) 145 Cal.App.3d 768. At page 771, the court held:

> "In the case at bench, not only had the demurrer not been sustained at the time that

> appellant filed his request for dismissal, but the hearing upon such demurrer had not occurred and was not even set for that day. Respondent's argument, when analyzed, urges us to declare a new rule of law to the effect that a tentative ruling of the trial court issued during the pendency of a hearing upon a demurrer negates the statutory authority conferred by section 581, subdivision 1. We decline to so declare."

This precedent should apply to all trials of law in the California second district, whether hearings on motions for summary judgement or demurrers, and it has not been abrogated by California courts until now, and in the unpublished opinion by these appellate justices in this case.

To justify a prejudicial decision, the justices, advanced a diversionary argument with five dissimilar and irrelevant cases, in a vain attempt to reconcile the irreconcilable of the Datner precedent.

First, was Sweat v. Hollister (1995) 37 Cal.App.4th 603, where a telephonic ruling permitted by San Diego County Rules of Court was determined to be final and not a tentative ruling.

Second, was Cravens v. State Board of Equalization (1997) 52 Cal.App.4th 253, where a

defendant filed a motion for summary judgement and plaintiff failed to file an opposition or statement of disputed facts within the time permitted which precluded a later voluntary dismissal by plaintiff.

Third, was Mary Morgan, Inc. v. Melzark (1996) 49 Cal.App.4th 765, where a hearing had commenced, after which the plaintiff received a continuance "for the express and exclusive purpose to produce opposition evidence it claims was previously unavailable." When plaintiff failed to produce such evidence, he could not thereafter voluntarily dismiss defendants.

Fourth, was M&R Properties v. Thomson (1992) 11 Cal.App.4th 899, where the plaintiff failed to bring the case to trial within the five year limit and voluntary dismissal was not permitted.

And, fifth, was Hartbrodt v. Burke (1996) 42 Cal.App.4th 168, where a voluntary dismissal was not permitted in the face of a prior terminating discovery sanction. (See petitioner's Appellant's Petition for Review to the California Supreme Court, pages 8-9.)

Here, the summary judgement motion was timely opposed; no tentative ruling was made known to petitioner (JA 130); the hearing had not even commenced nor a final ruling made when the dismissal was entered; and there was no dispositive

prior legally tenable reason to vacate the dismissal or grant the motion.

The circumstances in the above cited cases have no relationship to the circumstances in this matter. The citation to these cases was merely deceptive subterfuge by the trial court judges and appellate justices, in order to justify prejudicial determinations in altering the original proper trial court decisions. This done, so that at risk fellow lawyer defendants were improperly protected from liability of the impending default of their partnership and this injustice denied petitioner equal protection of the laws and due process.

With the properly entered dismissal of August 13, 1997, thereafter, the trial court lost jurisdiction to consider the lawyer defendants' motion for summary judgement. The trial judge acknowledged this in the court's Minute Order of August 14, 1997 (JA 43) and that should have been dispositive as to the facts and the law.

The lawyer defendants' motion to strike the dismissal was even improperly grounded on the doctrine of *nunc pro tunc.* (JA 55) Such an order is to correct what actually happened, but not recorded and not for "...an entry by a fiction to antedate the actual performance of an act which never occurred; or to supply an entire omission to act within the

time limit for such action ..." Matthies v. Railroad Retirement Board, 341 F2d 243, 246. Additionally, the California law case Harris v. Billings (2nd App. 1993) 16 Cal.App.4th 1396 at page 1405 holds:

> "Following entry of a dismissal of an action by plaintiff under section 581, a 'trial court is without jurisdiction to act further in the action [citations] except for the limited purpose of awarding costs and statutory attorney fees [citations]...' [Further citations are made including Datner.] The trial court in this case had no jurisdiction to vacate the dismissal without prejudice, properly entered pursuant to appellant's request, or to enter a new order dismissing the action with prejudice."

III. THE DEFAULT.

A. The question of fact of the default.

The complaint in this matter was properly served on the law firm partnership defendant, but it failed to appear and respond in any manner. Petitioner requested a default be entered and the default was entered by the clerk of the trial court August 20, 1997. (JA 45)

By its Minute Order of December 15, 1997 the trial court vacated the default because:

> "The Court finds that the plaintiff cannot recover a default judgement due to the bankruptcy stay, which lists both Victor Dirnfeld and Dirnfeld & Zelner, a partnership, and also because of lack of notice of the amount sought." (JA 596)

The true facts are that there was no stay order which listed Dirnfeld & Zelner, a partnership and plaintiff had filed a served Statement of the Amount of Damages Sought as an Exhibit in the entered default of August 20, 1997. (JA 52-53)

Victor Dirnfeld and his spouse filed a Voluntary Petition in bankruptcy where the petition shows as: "Other names used by debtor: dba Law Ofs of Victor Dirnfeld, Victor Dirnfeld & Associates, Dirnfeld & Zelner." (JA 591)

However, if it is considered as an actual stay order, a notice to creditors only named the debtors: Dirnfeld, Victor and Dirnfeld, Betty Louise. (JA 593) The final Order of Discharge was entered on November 19, 1996 and named only the debtors as; Dirnfeld, Victor and Dirnfeld, Betty Louise. (JA 590) The date of this final order is significant

because it was entered November 19, 1996, nine months before the default of the partnership was entered on August 20, 1997. (JA 45)

B. The question of law of the default.

Fundamental provisions of the bankruptcy act are that a petition for bankruptcy by an individual and his spouse, when filed, stays creditors actions against those debtors; and a discharge in bankruptcy, discharges the "personal liability" of the debtors for the debts discharged.

Even a cursory examination of the bankruptcy documents here, clearly shows that the debtors were the individuals Victor Dirnfeld and his spouse Betty Louise Dirnfeld. (JA 590-593) No other entity is shown as a debtor, such as the partnership of Dirnfeld & Zelner.

It would appear that a lengthy scholarly citation to code and case law is unnecessary to conclude that a discharge in bankruptcy only discharges the specific debtors actually named in the discharge order and no other entity. Yet, the original trial court judge falsely stated that a bankruptcy stay listed the partnership and as a justification for vacating the partnership's entered default. This done when it was cited to the trial court, the default

was entered nine months after the final order of the bankruptcy court discharging only the one individual partner.

The trial judge's second reason for vacating the default, concerning the notice of the amount of damages, was also false, as shown in the court's own records. (JA 45, 52-53)

The appellate opinion was even more pernicious than the trial court's decisions. That opinion (Appendix B, page 11) states: "The trial judge's ruling, however, was based on the proposition that appellant could not properly obtain entry of default against Dirnfeld & Zelner while that entity was listed on a 'bankruptcy stay' [presumably a stay order]."

All the documents cited above concerning the bankruptcy were cited by petitioner to both the trial court and to the appellate court in his appellate briefs. The appellate justices "presumed" there was a stay order naming the partnership, which the record shows to be false and the justices then affirmed the decision that the default was entered "while" there was such a stay order. The final order of the bankruptcy court discharged only Mr. & Mrs. Dirnfeld dated November 19, 1996 and the default was entered nine months later August 20, 1997.

It defies intelligence that the appellate justices could reasonably believe the default could have been entered "while" a stay order was effective in a bankruptcy matter which had concluded nine months previous, even if there had been an actual stay order listing the partnership in the first instance. The appellate opinion is a fraud, perpetrated out of prejudice.

IV. REASONS FOR GRANTING THE PETITION

The corruption of the trial court by its decisions is self-evident with one recused judge. The appellate opinion added insult to injury. The opinion begins with a distorted one-sided scenario about the prior procedural history of other cases, obviously intended to justify its biased conclusions. Even if this fiction was accurate, which petitioner disputes, it was and is irrelevant to the "Issues Presented on Appeal," to that appellate court.

The "DISCUSSION" presented in the appellate opinion in its entirety is shown to be, in misdirection by the lawyer defendants and accepted by the justices, in error. Petitioner's Appellant's Petition for Rehearing demonstrates conclusively that the lawyer respondent's declarations are taken as truth, when shown to be false in the court's own

minute orders. The appellate justices based their entire opinion on the false representations by the lawyer respondents. When brought to the justices attention in the petitioner's Appellant's Petition for Rehearing, pages 1 through 3 and petitioner's Petition for Review to the California Supreme Court, pages 4 through 7, no correction was made.

The appellate justices write in tedious detail of the irrelevant previous procedural cases, but in a "throw-away" parenthesis acknowledged "(appellant recovered judgement against the sub-agent.)" (Appendix B, page 3) The critical issues of dismissal and default are obfuscated by the diversion. If these two issues had been considered fairly in the first instance, the other minor issues would have been moot.

By malicious subterfuge concerning the vacated dismissal, the trial judges in their rulings and the appellate justices in their opinion, attempted to confuse dissimilar and irrelevant case law with the circumstances in this case in order to favor at risk fellow lawyer defendants and deny petitioner equal protection of the laws and due process. This was justified by accepting the declarations of the lawyer defendants as truth, when shown to be false by the court's own records.

By outright fabricated falsehood, the default of the partnership was vacated by determining that liability of the partnership was stayed by the bankruptcy of an individual partner, nine months after the bankruptcy was concluded which only discharged that individual, but not the partnership.

The judgement entered in this case is a further distortion of truth in stating: "... the matter having been heretofore dismissed as to defendants Victor Dirnfeld and Dirnfeld & Zelner by reason of their discharge in bankruptcy ..." (JA 606) Petitioner voluntarily dismissed Victor Dirnfeld (JA 19) and Dirnfeld & Zelner A Partnership was never dismissed by petitioner nor by the court. The court merely vacated the default of the partnership, albeit wrongfully. (JA 171)

There can be little doubt the petitioner was denied equal protection of the laws and due process. This issue might be considered trivial, to lawyers. However, this court is obligated to enforce federal rights for all citizens, even at the discomfort of some other fellow lawyers.

Your petitioner is one of a large, but uncounted, unnumbered class of citizens whose rights are denied or restricted by some well-meaning but zealot members of the legal profession to discourage *in pro se* litigants from access to and

justice in the courts. This is done from intimidation, ridicule and excessive adherence to form, to outright fraud, as in this case. The integrity of the legal profession and particularly the judges in this matter is at issue.

More than in criminal cases, this evil in civil actions may be in some instances an inadvertent conspiratorial denial of the civil right of a citizen to fairly represent himself in court for whatever reason, even if considered foolish by lawyers. Lawyers and judges should acknowledge this as an inherent professional prejudice and openly act to protect *in pro se* litigants from this bias.

This case may shed light, rather than on overt acts as here, but on the "wink" and "nod" sub-rosa type of conspiracy prevalent in some of this nation's courts by lawyers and judges.

In conclusion, for the reasons stated above, petitioner prays that this court issue a writ of certiorari for the review of the judgement below.

Respectfully submitted,

Thomas M. Eells,
Petitioner, *in pro se*

Dated: August 2, 1999

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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

THOMAS EELLS Plaintiff, v. DIRNFELD & ZELNER, et al. Defendants.	) BC160535)) JUDGEMENT)))))

The Court (Judge Aviva K. Bobb, [inserted in script]) theretofore granted Summary Judgement in favor of defendants Barry S. Zelner and Charles L. Fonarow, and the matter having been heretofore dismissed as to defendants Victor Dirnfeld and

Dirnfeld & Zelner by reason of their discharge in bankruptcy, and good cause appearing.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Thomas Eells, plaintiff take nothing by his action against defendants Charles L. Fonarow and Barry S. Zelner, and that judgement be entered in favor of defendants Barry S. Zelner and Charles L. Fonarow against plaintiff Thomas M. Eells. Defendants are awarded costs.

DATED: 11/4/98

/s/ Marlene A. Kristovich
JUDGE OF THE SUPERIOR COURT

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND DISTRICT DIVISION TWO

THOMAS EELLS	B127237
Plaintiff and appellant,	
	Super.Ct.No.
v.	No.BC160535
DIRNFELD & ZELNER, et al.	
Defendant and Respondent.	

COURT OF APPEAL-
SECOND DIST.
FILED
APR 01 1999
JOSEPH A. LANE, Clerk
J. SBIAVIBA Deputy Clerk

This case found its beginning when an insured Cadillac was struck in the side by a bicycle on December 1, 1979, almost twenty years ago. It has generated four previous lawsuits; the instant case is the fifth. The record shows that there is also a sixth. More detail than anyone could want to have is undoubtedly contained in the court records of

these various actions, and in any event the background facts seem not to be in controversy. Provided below is a summary of the facts reflected by the record on this appeal:

The auto-bicycle collision in 1979 damaged the Cadillac, and resulted in a $1200 insurance claim for repair of the car. The insurance claim was not properly investigated or paid. As a consequence, the insured was sued by the car repair shop in the first case, and had a judgement entered against him. This lead to the second case, an insurance bad faith action by the insured against both the current appellant, who was an insurance agent, and the insurance company which insured the Cadillac. The complaint in this second case was settled with the insurance company paying the insured $45,000. As part of the settlement, the case against appellant was also dismissed in return for his waiver of any future claims for malicious prosecution against the insured. The insurance company's indemnity crosscomplaint against appellant was then tried. The facts of this second case, and the award on the crosscomplaint, are chronicled in detail in a Statement of Decision signed by Judge Eli Chernow on January 27, 1987. The insurance company recovered an indemnity award of $11,250 against appellant for his mishandling of the insurance claim. Appellant

appealed that judgement, but Division Four affirmed in an unpublished decision.

Appellant then filed the third case, a fraud action against the insured (the same party against whom he had waived all malicious prosecution claims in return for the insured's dismissal of the complaint in the second case), an insurance sub-agent who had placed the insurance, and Dirnfeld & Zelner (the attorneys who had represented the insured in the second case, the insurance bad faith case.) The defendants demurred, and Judge Warren Deering sustained without leave to amend. Appellant appealed, and Division Seven reversed, directing the trial court to allow appellant to amend. Appellant did amend, but Judge David Jaffe later granted summary judgement to the insured and to Dirnfeld & Zelner on the grounds that appellant had waived all such claims against the insured. (appellant recovered judgement against the sub-agent.) Appellant then appealed the summary judgement, Division Seven affirmed in an unpublished decision dated July 10, 1990.

In the fourth case, the insured sued appellant for malicious prosecution of the third case. The insured's theory was that appellant had no probable cause to institute the third case, since appellant had waived any malicious prosecution claims against the insured in return for the insured's dismissal of the

second case. Summary judgement was granted in favor of appellant in this fourth case, but was reversed on appeal. The fourth case then went to trial before Judge Daniel Curry. At trial, the attorney who had represented appellant in the second case testified that he had advised appellant that appellant could sue the insured notwithstanding appellant's waiver of future malicious prosecution claims against the insured. Based on this testimony of attorney advise, Judge Curry concluded that malice had not been proven, and hence entered judgement for appellant.

Appellant then filed this fifth case against Dirnfeld & Zelner and respondents Barry Zelner and Charles Fonarow, alleging various theories. Although appellant alleged fraud, conspiracy to commit fraud and intentional infliction of emotional distress, the gravamen of the entire action was the allegedly malicious prosecution of the fourth case by the attorneys for the insured in the fourth case. After a default was entered against Dirnfeld & Zelner, respondents Zelner and Fonarow filed motions for summary judgement. On the day set for hearing of the summary judgement motions, the court continued the motions three days. Appellant then filed a voluntary dismissal, and then filed a new malicious prosecution lawsuit raising the same claims. The trial court subsequently vacated the

dismissal filed by appellant, and granted respondents' summary judgement motions. The trial court also vacated the default against Dirnfeld & Zelner on the grounds that the default had been improperly entered during a bankruptcy stay. In an unusual procedural sequence, appellant then made a motion for judgement on the pleadings against respondent Zelner and a motion to strike the answer of respondent Zelner, even though the trial court had already granted summary judgement in favor of respondents. The basis for these motions was that the complaint was verified, but Zelner's answer was not verified. The trial court denied these motions, and imposed sanctions on appellant. Appellant now appeals.

ISSUES RAISED ON APPEAL

Appellant raises the following issues:

1. Was it proper for the trial court to vacate the dismissal without prejudice which appellant voluntarily filed?
2. Was it proper for the trial court to vacate the default of Dirnfeld & Zelner on the basis of the bankruptcy stay imposed after the bankruptcy filing of Mr. Dirnfeld (an individual) and his wife?

3. Was it proper for the trial court to deny appellant's motion for judgement on the pleadings and motion to strike?
4. Did the trial court properly sanction appellant for filing the untimely motions?
5. Did the trial court properly grant summary judgement?
6. Did the trial court err in not sanctioning Respondents?

DISCUSSION

1. Was it proper for the trial court to vacate appellant's voluntary dismissal without prejudice and subsequently to hear and grant respondents' motions for summary judgement?

In making his motion to strike appellant's request for voluntary dismissal without prejudice, and instead to grant respondents' summary judgement motion, respondent Fonorow declared as follows: His summary judgement motion had been continued on the court's own motion from the originally noticed day to August 11, 1997. He appeared on that day in Department 82, but was informed by the clerk that the court was not ready to rule, and that the matter would be continued again to August 14. Based on that information, he left Department 82 and went to Santa Monica, where he

had another court appearance. He later received a call from the clerk in Department 82, who advised that if he could return to Department 82, the court was ready to rule. However, since he was already in Santa Monica, respondent Fonorow advised the clerk that he could not return on August 11, and that the continuance to August 14 would therefore have to stand. The clerk then read to respondent Fonorow the court's tentative ruling granting summary judgement to both respondents "and advised me [Fonorow] that he had similarly read the tentative ruling to plaintiff Eells"1 (Footnote: 1. Although appellant filed written evidentiary objections to certain portions of respondent Fonorow's declaration, there was no hearsay objection to this passage.) On August 13, respondent Fonorow was advised by the Department 82 clerk that appellant had dismissed the case. Initially he understood that the dismissal was with prejudice, but later learned that it was without prejudice and that appellant had filed a new action.

In opposition, appellant argued that respondents should have known that appellant's dismissal was without prejudice, took issue with respondent Fonorow's declaration that initially he did not know, and asked for sanctions. However, appellant did not contest respondent Fonorow's declaration that the clerk had read to appellant the

court's tentative ruling granting summary judgement motions.

The trial court granted the motion to vacate the dismissal, and re-set the summary judgement motions for hearing. Appellate has demonstrated no error in this ruling. In *Mary Morgan, Inc. v. Melzark* (1996) 49 Cal.App.4th 765, for example, the court issued a tentative ruling granting summary judgement. The plaintiff (appellant *Mary Morgan*) advised the court that certain deposition transcripts had only recently become available and requested a continuance to present further opposition. The trial court continued the motion for that purpose, but the plaintiff then dismissed without prejudice. The trial court ruled that plaintiff was not permitted to dismiss without prejudice under these circumstances, and granted summary judgement. The Court of Appeal affirmed, ruling specifically that when a hearing has begun on a defendant's summary judgement motion, and is continued to allow the opposing plaintiff to gather additional evidence, that plaintiff may not then dismiss without prejudice. Similarly, in *M & R Properties v. Thomson* (1992) 11 Cal.App.4th 899, the defendant moved to dismiss for failure to bring to trial within five years. The day before the noticed hearing date, the court issued a tentative ruling granting the motion. Plaintiff then dismissed without prejudice.

The trial court vacated the dismissal without prejudice and entered dismissal with prejudice. The Court of Appeal affirmed. Again similarly, in *Hartbrodt v. Burke* (1996) 42 Cal.App.4th 168, defendant moved to dismiss as a discovery sanction for plaintiff's refusal to comply with a court order to produce documents. Just before hearing of the motion to enforce the court's prior order, plaintiff dismissed without prejudice. The trial court "rejected appellant's voluntary dismissal and granted respondent's motion to dismiss with prejudice ..." (*Id.* at p. 172.) Citing *M & R Properties,* the *Hartbrodt* court affirmed.

Notwithstanding these authorities, appellant argues that *Datner v. Mann Theatres Corp* (1983) 145 Cal.App.3d 768 requires that we reverse and allow appellant to pursue the sixth case, which repeats the malicious prosecution allegations against respondents. In *Datner,* defendant demurrer to plaintiff's complaint. After receiving the demurrer and notice of hearing, plaintiff dismissed without prejudice. Defendant contended that, in an unreported in-chambers conference, the trial judge had advised of his intention to sustain the demurrer. The dismissal was vacated, and the demurrer was sustained without leave to amend. The Court of Appeal reversed, holding that the plaintiff had a

right to dismiss without prejudice at any time until the demurrer was ruled upon.

There are bases on which *Datner* could be reconciled with *Mary Morgan, M & R* and *Hartbrodt.* A pleading ruling such as that on a demurrer, for example, is often without preclusive effect, for a plaintiff, upon accumulating additional facts to plead, can often replead to state a different cause of action. Hence a plaintiff with no statute of limitation problem might have legitimate reasons for dismissing in order to allow further time to investigate and assemble its case. Thus *Datner* dealt with a situation in which the court's ruling might not be dispostive, and in which the defects in plaintiff's pleading might be correctable after additional investigation. The more recent cases cited above, by contrast, all dealt with dispositive motions. However, even assuming that *Datner* cannot be reconciled with the more recent cases, we find the more recent cases persuasive. When the plaintiff learns that its case will be ended by a dispositive motion, the plaintiff should not be permitted to "punish" the defendant, or to "judge-shop," by dismissing to avoid the dispositive motion and then re-filing the same claim for hearing at a later time, perhaps before a different judge. The rationale for this rule has been amply explained in *Mary Morgan, M & R and Hartbrodt,* and little purpose would be

served by repeating, in this unpublished opinion, the explanation provided there.

2. Was it proper for the trial court to vacate the default of Dirnfeld & Zelner on the basis of the bankruptcy stay imposed by the bankruptcy filing of Mr. Dirnfeld (an individual) and his wife?

The trial court found "that plaintiff cannot recover a default judgement due to the bankruptcy stay, which lists both Victor Dirnfeld and Dirnfeld & Zelner, a partnership ..." Appellant contends that this ruling was wrong, but fails to supply any citation to evidence or authority either before the trial court or before this court which demonstrates error. Appellant cites primarily to what he terms "excerpts" from the bankruptcy of Victor Dirnfeld and Betty Louise Dirnfeld. The trial judge's ruling, however, was based on the proposition that appellant could not properly obtain entry of a default against Dirnfeld & Zelner while that entity was listed on a "bankruptcy stay" [presumably the stay order]. There has been no showing that it was demonstrated in the trial court that Dirnfeld & Zelner were not listed on a bankruptcy stay order, and hence there appears to be no record demonstrating error. Nor has it been demonstrated here that there was no bankruptcy stay in place, as the trial court found. We have not been cited to any

portion of the record before us showing error. The "excerpts" in the record were apparently not before the trial court, and in any event are not complete. In addition, these excerpts do not show exactly what orders the bankruptcy court had made. The citation of law supposedly germane to bankruptcy, some of it dating back to 1916 when the bankruptcy laws were much different, is therefore of little help here. It is appellant's burden to show error, and appellant simply has not done that.

3. Was it proper for the trial court to deny the motion for judgement on the pleadings and the motion to strike?

Appellant's motion for judgement on the pleadings and motion to strike were properly denied because these motions were filed and noticed for hearing after the trial court had already granted respondents' summary judgement motions. The motion for judgement on the pleadings were merely an improper collateral attack on the court's prior ruling granting summary judgement. The motion to strike the answer was inconsequential, inasmuch as respondents had already defeated appellant's complaint as a matter of fact on the merits, and also constituted an improper collateral attack on the prior summary judgement orders. Appellant's briefing provides no authority for the unusual procedural sequence of making such motions after summary

judgement has already been granted, and we know of none. The trial court denied these motions as untimely. No error has been demonstrated.

4. Did the trial court properly sanction appellant?

The trial court treated appellant's post-summary judgement motions for judgement on the pleadings and to strike respondent Zelner's answer as motions for reconsideration. The court then imposed $550 in sanctions on appellant pursuant to Code of Civil Procedure section 1008. Although the minute order in which these sanctions were imposed states that the "Court's ruling is more fully reflected in the notes of the official court reporter this date; incorporated herein by reference," appellant has not provided us with these notes. Appellant instead argues simply that section 1008 stated, at the time in question, that violations may be punished "with sanctions as allowed by Section 128.5." Appellant then argues that section 128.5 required that an order imposing sanctions "shall be in writing and shall recite in detail the conduct or circumstances justifying the order." The statute contained this requirement of a written order reciting in detail the conduct justifying the sanctions in order to ensure that the imposition of sanctions is carefully considered. If a judge were unable to articulate a proper basis for sanctions, then sanctions would not

be imposed. Hence the writing requirement. The court's minute order in the instant case states the appellant's motions for judgement on the pleadings and to strike respondent Zelner's complaint were denied because they were "untimely." Hence there is a written order in this case. While somewhat cryptic, in the context of this case this short minute order left nothing to doubt and served the purpose of ensuring that sanctions were properly considered and imposed. The record is clear that appellant was being sanctioned for harassing respondents with these two untimely motions. No error has been demonstrated.

5. Did the trial court properly grant summary judgement?

To recapitulate: This fifth action alleged malicious prosecution of the fourth action. In the fourth action, the insured sued appellant for malicious prosecution of the third action. The insured's theory was that appellant had no probable cause to file the third action. In the fourth action, the trial judge found that appellant had acted on advice of counsel in the third action, and hence that appellant had no malice. Judgement in the fourth action thus went to appellant, and appellant then filed this fifth action against attorneys who had allegedly represented the insured in the fourth action.

In moving for summary judgement in this fifth action, respondents contended they had, as a matter of law, probable cause to institute the fourth action for malicious prosecution of the third action. Whether a person did or did not have probable cause to file an action is a question of law to be determined by an objective standard. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863 [if underlying lawsuit was "objectively tenable" no malice prosecution].) Thus the reasonableness of the prior lawsuit, based on the facts then known to the current defendant, must be objectively determined. (*Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547). Here those objective facts are all shown by the voluminous record of the four cases leading up to this one, plus the records of this fifth case.

The uncontradicted evidence showed that as part of the settlement of the second action, counsel for appellant in the second action stipulated in open court that appellant waived any claim for malicious prosecution against the insured. The record also reflects, primarily, in the lengthy statement of decision signed by Judge Chernow, that it had already been adjudicated that the insured had ample reason to file suit against appellant in the second action. Appellant nevertheless sued the insured in the third action for "fraud," claiming that the insured had no basis to sue appellant in the second action,

and that his suit had been fraudulently concocted. Appellant apparently characterized his claims against the insured in the third action in terms of "fraud," because he had waived his right to sue the insured for malicious prosecution. The gist of appellant's complaint in the third action, however, was that the insured had improperly sued him in the second action.

After the insured filed the fourth action, against appellant for malicious prosecution of the third action, appellant moved for summary judgement. Summary judgement was granted by Judge Charles Lee. That summary judgement, however, was reversed in an unpublished opinion because, inter alia, appellant had not presented any evidence linking the insured to any alleged fraudulent scheme, because Judge Chernow had previously found that "the failure to establish reasonable procedures and to conduct a reasonable investigation as required by California law was in the first instance Mr. Eells' [appellant's] active failure," and because it had previously been found that appellant was the proximate cause of the insured's injuries in the second action. The fourth action then returned to the trial court to be tried by Judge Daniel Curry. In his statement of decision, Judge Curry referred to the immediately prior Court of Appeal opinion that the underlying action was

terminated favorably for the plaintiff and that defendant lacked probable cause for initiating the underlying action. Therefore, the only issue to be determined by the court was whether the defendant initiated the underlying action with malice, and if so, what damages, if any, did plaintiff suffer as a result." As noted above, Judge Curry found no malice, and hence held for appellant in that fourth case. The findings made by Judge Curry, however, based on the prior findings of several prior courts, are dispostive of appellant's claim that the fourth case was maliciously prosecuted. The record establishes clearly that it has been adjudicated that the failure to process the insured's original insurance claim back in 1979-1980 was the fault of appellant, that appellant's fault had caused damage to the insured, and that appellant's suit against the insured (the third suit) had been terminated in the insured's favor. Hence at the time appellant sued the insured in the third suit, it had already been adjudicated that appellant himself had committed the acts which lead to the insured's filing of the second suit - appellant himself had mishandled the insured's claim. Nevertheless, the appellant sued the insured for "fraud" in the third suit, and the insured obtained a favorable termination of that case. Under these circumstances, the insured, and hence the insured's

lawyers, had probable cause to sue appellant for malicious prosecution of the third action.

Respondent Zelner additionally moved for summary judgement on the contention that he had never been attorney of record for the insured in the fourth case, the insured's suit for malicious prosecution against appellant. Inasmuch as we have determined that the insured, and hence his lawyers, had probable cause to prosecute that suit for malicious prosecution against appellant, this additional basis for summary judgement presents only a moot point.

6. Did the trial court err in not sanctioning respondents?

After summary judgement was granted in this action in favor of respondents, and after appellant nevertheless filed a motion for judgement on the pleadings as to respondent Zelner and a motion to strike the answer of respondent Zelner, and after respondents responded with a motion for sanctions for filing of these two motions, appellant moved the court to impose sanctions on respondents. The trial court placed appellant's motion off calendar "on the grounds that the service is defective; served and filed at the same time." Apparently the problem was a perceived failure to satisfy the "safe-harbor" provisions of Code of Civil Procedure section 128.7. Appellant now contends that the service was proper,

but has not provided citations to the record so demonstrating. In any event, any error we might find was harmless inasmuch as appellant had not demonstrated that sanctions should have been granted. Hence no reversible error has been shown in the court's handling of appellant's sanction motion.

CONCLUSION

The judgement is affirmed. Respondents to recover costs on appeal.
NOT TO BE PUBLISHED.

/s/ ZEBROWSKI, J.

We concur:

/s/ BOREN, P.J.

/s/ MALLANO, J.*

* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Second Appellate District,
Division Two, No. B127237
S078420
IN THE SUPREME COURT OF CALIFORNIA

THOMAS EELLS,
Appellant

v.

DIRNFELD & ZELNER, Et Al.,
Respondents

SUPREME COURT
FILED
JUN 16, 1999
ROBERT WANDRUFF
CLERK
DEPUTY

Appellant's petition for review DENIED.

/s/ GEORGE
Chief Justice

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
JOSEPH A LANE, CLERK DIVISION TWO

Los Angeles County Superior Court
111 North Hill Street
Los Angeles, CA 90012

Eells
v.
Dirnfeld & Zelner
B127237
Los Angeles County No. BC160535

REMITTITUR

I, Joseph A. Lane, Clerk of the Court of Appeal of the State of California, for the Second appellate District, do hereby certify that the attached is a true and correct copy of the original order, opinion or decision entered in the above-entitled cause on April 1, 1999 and that this order, opinion or decision has now become final.

Respondents to recover costs.

Witness my hand and seal of the Court
affixed at my office this JUN 24 1999
/s/ Joseph A. Lane, Clerk